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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1735

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
for The Third Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. (hereafter "Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents

the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706 (1989). Additionally, Southeastern has recently submitted *amicus curiae* briefs in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (decided June 27, 1990); *U.S. v. Eichman and U.S. v. Haggerty*, Nos. 89-1433, 89-1434 (decided June 11, 1990); and *Pacific Mutual Life Insurance Company v. Haslip, et al.*, No. 89-1279, which is currently pending before this Court.

Southeastern believes this case merits review by this Court because it presents serious questions of how individual rights can be protected from governmental excesses in the enforcement of laws for the ostensible protection of the environment and the administration of justice by the lower federal courts. It is vitally important for the courts to protect these individual freedoms in the face of the increased criminal enforcement of the myriad of environmental laws, both current and future. While *Amicus* supports all four of the questions presented by Petitioner, this brief will focus on question III, dealing with the validity of the Sentencing Guidelines.

STATEMENT OF THE CASE

Southeastern adopts the statement of the case contained in Petitioner Pozsgai's Petition for A Writ of Certiorari.

SUMMARY OF ARGUMENT

The 27-month sentence Petitioner Pozsgai received under the Sentencing Guidelines for violating the Clean Water Act highlights some of the problems contained in the Sentencing Guidelines for environmental offenses. One of the most significant problems with the environmental guidelines is that they result in sentences which exceed the maximum sentence permitted by the underlying environmental statute. This not only alters or reverses the Congressional determination of the seriousness of the category of offense, but impermissibly reduces the range of sentences required by the Comprehensive Crime Control Act to a single term of imprisonment — the statutory maximum.

Furthermore, the Guidelines fail to contemplate sentences other than imprisonment for first offenders of environmental laws. The Guidelines both violate the Sentencing Commission's enabling statute and conflict with the underlying environmental laws.

Due to the importance of the issues raised by the trial court's application of the Sentencing Guidelines, this Court should grant certiorari to review this conviction under the Court's supervisory powers over the administration of criminal justice in the lower federal courts.

ARGUMENT[1]

I. The History of The Guidelines.

Beginning in the 1970s, Congress considered several pieces of legislation designed to improve federal sentencing practices. *See generally*, C. Ogletree, Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," 101 *Harvard L. Rev.* 1938, 1944, n. 34 (1989). The most frequent criticism of the existing sentencing practice was that it gave excessively broad discretion to sentencing judges, resulting in widely disparate treatment for similarly situated individuals. *Id.*

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the United States Sentencing Commission as "an independent commission in the judicial branch." 28 U.S.C. Section 991(a). The Commission was tasked with drafting sentencing guidelines that would result in more definitive sentences and narrow the disparity in sentences imposed on similarly situated offenders for comparable criminal conduct. 28 U.S.C. Section 991(b)(1)(B). However, the Sentencing Commission was expected to leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. 18 U.S.C. Section 3553(b).

Following its creation, the Sentencing Commission conducted extensive public hearings and a research pro-

1 Many of the arguments presented in *Amicus'* brief are drawn directly from Benjamin S. Sharp and Leonard H. Shen's paper, "The (Mis) Application of The Sentencing Guidelines To Environmental Crimes,' which was presented at the ALI-ABA Course of Study Criminal Enforcement of Environment Laws seminar on April 19-20, 1990 in Washington, D.C. Messrs. Sharp and Shen are attorneys with the Washington, D.C. law firm of Perkins Coie.

gram analyzing approximately 100,000 federal criminal cases. After receiving considerable public comment on a preliminary draft of the guidelines issued in September 1986, a revised draft was submitted for public comment in January 1987 and became final on November 1, 1987.

Insofar as relatively few environmental crimes had reached actual sentencing before the final Guidelines were released in 1987, the guidelines that deal with environmental crimes did not have as extensive an "experience baseline" to guide the drafters, as did all other guidelines. As a consequence, the Commission appears to have ignored existing historical sentencing data in this area and filled the experience void with its own arbitrary choices. The policy decisions ultimately made by the Commission seem unconstrained by congressional directives and at odds with policy choices made by Congress when it enacted the substantive environmental statutes.

Indeed, the paucity of environmental prosecutions and the relatively lenient sentences imposed before the Guidelines were promulgated (*See Petition for Cert.* Appendix 30A-39a) underscore the regulatory nature of these environmental infractions. Unlike crimes such as bank robbery, arson, and rape, the government is able to control, correct, and civilly punish environmental infractions. Consequently, even the sentencing data that does exist on environmental criminal cases is, in effect, not truly representative of how society deals with this "crime," because the same conduct, and sometimes even *worse* conduct, is disposed of *outside* the criminal justice system.

II. The Guidelines Prescribe The Maximum Statutory Sentence For Certain Categories of Environmental Violations.

Several categories of environmental crimes are misdemeanors. All Toxic Substances Control Act (TSCA) criminal violations are misdemeanors, with a maximum imprisonment term of one year and a maximum fine of $25,000 per day of violation. 15 U.S.C. Section 2615(b). Most Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations are similarly punishable by up to one year imprisonment, although a private applicator may only be imprisoned for up to 30 days. 7 U.S.C. Section 1361(b). Clean Water Act (CWA) negligent violations also trigger a one-year imprisonment maximum. 33 U.S.C. Section 1319(c)(1).[2]

Yet because the Guidelines fail to distinguish between misdemeanors and felonies, the statutory maximum terms may often be *exceeded* by a sentence calculated under the Guidelines. For example, the shortest Guideline sentence available for a base level offense violation of FIFRA by a private pesticide applicator (base level 8) is from 2 to 8 months, which is from *two to eight times* the statutory maximum (30 days). *See* Section 2Q1.2.

A violation of the Clean Water Act has been transformed by application of the Guidelines into a much more

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2 The Application Notes accompanying Section 2Q1.2 (Note 4) and Section 2Q1.3 (Note 3) indicate that downward departures may be appropriate for negligent violations. No guidance is provided suggesting how great a departure may be warranted or whether wholesale abandonment of the guidelines for misdemeanors is appropriate. Some courts have likened the notes to legislative history that cannot override the guideline or be resorted to unless there is facial ambiguity in the guideline. *See, e.g., U.S. v. Anderson*, 895 F.2d 641, 645 (9th Cir.1990).

serious transgression than the statute itself would suggest. The CWA sets a statutory maximum of three years imprisonment for so-called "knowing" violations (one year for negligence) that do not rise to the level of a "knowing endangerment." 33 U.S.C. Section 1319(c)(2).

Despite this statutory maximum, however, the Guidelines' choice of specific offense characteristics will in virtually all cases assure a minimum offense level of 14 to 18 for any CWA violation, including those involving a non-hazardous pollutant such as fill dirt, which happened in this particular case with Mr. Pozsgai. This would result in a sentence just within the statutory maximum range for a felony and well above the maximum for a misdemeanor, for a defendant with no prior criminal history, and a sentence above the statutory maximum for defendants with any prior history.

For example, specific offense characteristic (b)(4) requires a four-level increase for discharges without a permit or in violation of a permit (in the case of non-hazardous water pollutants), or for disposal without a permit or in violation of a permit (in the case of hazardous water pollutants). Since virtually all violations of the CWA involve discharge in violation of or without a permit, this will *automatically* result in an effective base level of 10 (6 + 4).

Next, characteristic (b)(1) requires a four-level increase for any discharge of a pollutant, which by definition will always be the case whenever there has been a discharge in violation of a permit.[3] (If the discharge is ongoing, continuous, or repetitive, again the likely scenario for CWA violations, there will be a six- level

3 Although the Guidelines do not define pollutant, the CWA does. A pollutant includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. Section 1362 (6).

increase.) Finally, many discharges into publicly owned treatment works (POTWs) would qualify as "disruption of a public utility," requiring an additional four points.

Therefore, the total offense level for virtually any Clean Water Act violation is at least 14, and in a substantial portion of CWA cases, closer to 18 or 20 — right at the statutory maximum level. Thus, for example, the court in *United States v. Ocie Mills and Carey Mills*, No. 88-03100-01/WEA (N.D. Fla. 1989), *aff'd without opinion* (11th Cir. No. 89-3325, May 15, 1990), sentenced the defendants each to 21 months in prison for filling a 75 ' x 300' wetlands area with dirt, invoking the "ongoing or repetitive release" characteristic of Section 2Q1.3(b)(1) and the "discharge without a permit" characteristic of Section 2Q1.3(b)(4).

In Mr. Pozsgai's case he was charged with discharging earth and clean fill without a permit in violation of the Clean Water Act, 33 U.S.C. Sections 1311(a), 1319(c)(2)(A), 1344(a). He received six points, which was the base offense level, for discharging a pollutant without a permit. Section 2Q1.3(a). In addition to the base offense points, he received six more points for discharging a pollutant (Section 2Q1.3(b)(1)(A)), and four more points for not having the permit (Section 2Q1.3(b)(4)).

A. By Prescribing The Statutory Maximum, The Guidelines Violate Their Enabling Statute.

The Guidelines do provide that where the guidelines sentence would exceed the statutory maximum, the statutory maximum controls. *See* 18 U.S.C. Section 3559(b); Section 5G1.1 (statutory maximum governs as to an imprisonment term); *see also* Section 5E1.2(c)(4) (statutory fine if based on a per day violation will govern instead of the

Guidelines fine). It is, of course, clear that an independent agency cannot lawfully preempt the Congressional judgment in the original substantive statute by prescribing a regulatory sentence more severe than the appropriate maximum sentence for particular environmental violations.

However, the Guidelines effect an analogous result of questionable validity. The Sentencing Commission has compressed the range of sentences available, turning the penalty into a mandatory *minimum* (and maximum) for many types of crimes. Although there is no *per se* constitutional defect in statutes providing mandatory minimum sentences — *see, e.g., McMillian v. Pennsylvania,* 477 U.S. 79, 92, 106 S.Ct. 2411 (1986) — by establishing what amounts to a flat sentence, the Guidelines here violate the Comprehensive Crime Control Act itself, which requires that the Commission establish a sentencing *range* for each category of defense. *See*, 28 U.S.C. Section 994(b)(1); *see also, Mistretta v. U.S.*, ___ U.S. ___, 109 S.Ct. 647, 656 (1989). Furthermore, for sentencing involving imprisonment, Congress mandated that "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or six months." 28 U.S.C. Section 994(b)(2). Where the Guidelines result in a *minimum* sentence of one year for misdemeanors, or a sentencing range for felonies where the minimum is less than 25 percent below the maximum, it is clear that the Guidelines are inconsistent with their enabling legislation.

This result also violates Congress' mandate that "the Commission shall insure that the guidelines reflect the general inappropriateness of imposing a sentence to a term of imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C.

Section 994(j). Insofar as very few of the misdemeanor violations of TSCA or FIFRA, or a negligent violation of the CWA, can be considered a "crime of violence or an otherwise serious offense," the imposition of not only a sentence of imprisonment, but the *maximum* available sentence, clearly violates the leniency Congress intended *and* required for a first offender. *Id.*

Finally, as a policy matter it is troubling that whole categories of environmental crimes have suddenly been transformed into mandatory minimum violations by a Commission that was not charged by Congress to rewrite priorities in environmental enforcement. Apart from tending to transform a statutory maximum into a sentencing minimum, the fact that the specific offense characteristics are virtually always triggered in the Clean Water Act context, for example, means that a CWA violation will *per se* be treated much more seriously than another environmental violation — even if Congress assigns a lower statutory maximum to the CWA than, for example, many RCRA permit violations. *Compare* 33 U.S.C. Section 1319(c) with 42 U.S.C. Section 6928(d).

Indeed, this uniform aggravation of sentencing for Clean Water Act violations disrupts the carefully crafted hierarchy of criminal penalties (with different terms for negligent, knowing, and knowing endangerment crimes) established by Congress' 1987 CWA amendments. A *specific* and *substantive* statutory scheme — the CWA — setting forth explicit offenses and sentencing ranges, cannot constitutionally be overridden by a general statutory framework intended by Congress to set overall sentencing parameters. In this instance, the Guidelines, and the Sentencing Commission, have become the tail wagging the environmental dog. This violates principles of separation of powers. U.S. Const., Art. I, Sec. 1; see *Mistretta v. U.S., supra.*

B. The Specific Offense Characteristics Bear Little Relation To Policy Choices Made In The Underlying Statutes.

Most guidelines in other areas cover specific crimes (*e.g.*, perjury) and use the offense characteristics to differentiate common circumstances surrounding the crime (*e.g.*, causing physical injury to a person or resulting in substantial interference with the administration of justice) as aggravating or mitigating factors. *See*, Section 2J1.3. By contrast, the environmental guidelines attempt to encompass an extensive range of offenses under two guidelines that cannot reasonably be tailored to the diversity of crimes to which they apply. The offense characteristics and their Application Notes cannot apply the myriad factual circumstances that may aggravate or mitigate so many offenses. As a consequence, neither the base levels nor the offense characteristics are common to the bulk of the offenses covered. Moreover, the specific offense characteristics used as adjustment factors fail to follow the logic of the underlying environmental statutes.

In the case of single as opposed to repetitive releases, both Section 2Q1.2 and Section 2Q1.3 provide for increasing the base offense level by six levels "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge of a. . . pollutant into the environment," while the base offense level may only be increased by four levels "if the offense otherwise involved a discharge, release, or emission of a pollutant." Section 2Q1.2(b)(1); Section 2Q1.3(b)(1).

While it may make good policy sense to impose a greater sentence where a continuous or repetitive environmental discharge is occurring, this guideline ignores the fact that the substantive environmental statutes passed by Congress already provide for separate counts

for such discharges, and the criminal fine provisions of both the statutes and the guidelines already allow per-day fines. Section 5E1.2(c); *Cf. Chesapeake Bay Foundation v. Gwaltney of Smithfied*, 791 F.2d 304, 316 (4th Cir. 1986) (assessing protracted Clean Water Act civil violations at approximately $5,000 per day), *rev'd on other grounds*, 108 S.Ct. 376 (1987); *U.S. v. T & S Brass, Inc.*, 681 F.Supp. 314, 322 (D.S.C. 1988) (imposing $1,000 per day for RCRA civil violation); and *U.S. v. SCM Corp.*, 667 F.Supp. 1110, 1128 (D.Md. 1987) (assessing sequential Clean Air Act violations at $10,000 per day).

The underlying statutes are thus already finely tuned to increase the ultimate penalty in accordance with the continuous or repetitive nature of the discharge; yet the Guidelines now *double count* a multiple discharge violation, by increasing the offense level for each individual violation as well as allowing sentencing for multiple counts. *See*, Section 5G1.2. Insofar as many Clean Air Act and Clean Water Act discharge violations involve dozens or even hundreds of days of effluent or air emission releases, increase of the penalty will be applicable in the vast majority of circumstances under the Guidelines — despite the fact that Congress, when it established the availability of per-day violation fines in the environmental laws, had already considered and allowed charging for repetitive violations.

III. Certiorari Should Be Granted.

Amicus submits that the circumstances of this case present important and unanswered questions as to the application of the Sentencing Guidelines to a conviction such as Petitioner's, and to environmental crimes generally. Moreover, there is a serious question as to whether

the U.S. Sentencing Commission followed the congressional mandate in enacting Section 2Q1.3 of the Guidelines.

This Court has jurisdiction *sub judice* for the same fundamental reason set forth in *McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 613 (1943). "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.* Due to the harshness of the sentences imposed on Petitioner, and because of the questions as to the legality and appropriateness of the Guidelines for environmental law crimes, this Court should grant review.

CONCLUSION

This Court should grant Petitioner Pozsgai's petition for certiorari.

Respectfully submitted,

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